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No. 71-1290

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM BINDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

JOHN P. BURKE,
CHARLES J. ALEXANDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Christianson v. *United States*, 226 F. 2d 646, certiorari denied, 350 U.S. 994	9
First National Bank in Dallas v. *United States*, 420 F. 2d 725, certiorari denied, 398 U.S. 950	4
Sansone v. *United States*, 380 U.S. 343	10
Spies v. *United States*, 317 U.S. 492	10
United States v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924	10
United States v. *Russo*, 442 F. 2d 498	9

Statutes:

Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809	3, 4, 8, 9
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 4911	3
Section 4918	3
Section 4920	3
Section 7201	2, 3

Statutes—Continued

	Page
18 U.S.C. 2	3
18 U.S.C. 371	2
Miscellaneous:	
109 Cong. Rec. 12806	4
109 Cong. Rec. 12940	4
H. Conf. Rep. No. 1816, 88th Cong., 2d Sess. (1964-2 Cum. Bull. 815)	4
H. Rep. No. 1046, 88th Cong., 1st Sess. (1964-2 Cum. Bull. 708)	4
S. Rep. No. 1267, 88th Cong., 2d Sess. (1964-2 Cum. Bull. 767)	3-4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 453 F. 2d 805. An unreported opinion of the district court (Cannella, D.J.) on the *ex post facto* issue is reprinted as Appendix A to the petition in *Edward Samuels* v. *United States*, No. 71-1307. An opinion of the district court (Mansfield, D.J.) overruling petitioner's motion for an acquittal n.o.v. is unofficially reported at 71-1 U.S.T.C. ¶ 15,978.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1971 (Pet. App. B1). A petition for rehearing and for rehearing *en banc* was denied on February 8, 1972 (Pet. App. B2, and B3). By order of March 7, 1972, Mr. Justice Marshall extended the time for filing a petition for certiorari to April 8, 1972. The petition for a writ of certiorari was filed on April 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether the conviction of petitioner of conspiracy to evade tax and to defraud the United States in violation of 18 U.S.C. 371 is valid under the *ex post facto* clause of the Constitution.

3. Whether it is necessary to charge and prove the filing of a false return in a conviction for attempting to evade and defeat a tax in violation of 26 U.S.C. 7201.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth at Pet. 2-4.

STATEMENT

After a jury trial with others [1] petitioner was convicted of one count of conspiracy to evade taxes and to defraud the United States, in violation of 18 U.S.C. 371, and of two counts of attempted evasion of interest equalization tax, in violation of 26 U.S.C. 7201.[2] He was fined $2000 on the conspiracy count and placed on probation for two years; imposition of sentence on the remaining two counts was suspended. The court of appeals affirmed (Pet. App. A1-A10, B1) and denied rehearing (Pet. App. B2, B3).

A full statement of the facts of this case necessitates a brief review of the history and purpose of the Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809.[3] This Act (with exceptions not here relevant) imposes an excise tax on the purchase of foreign securities by a citizen or resident of the United States from a person not a citizen or resident (26 U.S.C. 4911, 4918, 4920). President Kennedy had proposed this tax to help correct the deficit in the United States balance of payments by inhibiting the flow of dollars out of the country for the purchase of foreign securities. S. Rep. No. 1267, 88th Cong., 2d Sess. (1964-2

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[1] The convictions of co-defendants Max Blauner and Edward Samuels were also affirmed on appeal, 453 F. 2d 805, and they have each filed a separate petition for writ of certiorari (Blauner, No. 71-6519; Samuels, No. 71-1307).

[2] The interest equalization tax liability was not that of petitioner, but he was charged as a principal under 18 U.S.C. 2.

[3] 26 U.S.C. 4911, *et seq.*

Cum. Bull. 767).[4] To prevent a run of last-minute investments in anticipation of passage of the proposal, the President's original message to the Congress asked that the tax be made retroactive. 109 Cong. Rec. 12806 (Senate), 12940 (House of Representatives) (1963). The Act was enacted on September 2, 1964, and the tax thereby imposed applied retroactively to purchases made after July 18, 1963 (Section 2(c) of the Act).

During legislative consideration of the President's proposal, there developed, in response to the proposal and the increasing likelihood of its passage, a disparity between the market prices of American-owned and foreign-owned foreign securities. The former command a slight premium over the latter in American markets, because investors realized that acquisitions of the latter might give rise to a retroactive tax. As a result of this premium, an American dealer could obtain an arbitrage profit by buying foreign-owned securities and reselling them as American-owned.[5] See Pet. App. A3-A4.

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[4] The background of the Act is set forth in greater detail in the opinion of the United States Court of Claims in *First National Bank in Dallas* v. *United States*, 420 F. 2d 725, certiorari denied, 398 U.S. 950. See also H. Rep. No. 1046, 88th Cong., 1st Sess. (1964-2 Cum. Bull. 708); H.Conf. Rep. No. 1816, 88th Cong., 2d Sess. (1964-2 Cum. Bull. 815).

[5] The arbitrage profits obtainable on such transactions were generally small in relation to the interest equalization tax liability which would accrue thereon if, as proved to be the case, the tax were imposed retroactively. Thus legitimate dealers engaging in such transactions were in effect betting against a retroactive imposition of the tax.

During this time, in the summer of 1964, petitioner's co-defendants, Henry Scharf,[6] Max Blauner and Edward Samuels evolved a scheme whereby arbitrage trading would be conducted in a manner so as fraudulently to avoid imposition of any interest equalization tax (R. 408, 410-411).[7] Their plan involved purchasing foreign-owned foreign securities in the name of a non-resident American citizen who would act as a "straw" and sign false statements that the purchases were being made for his account and false certificates of American ownership (R. 68-69, 109, 408-409).[8] Petitioner, who had been acquainted with Scharf for several years, undertook to find a non-resident citizen who would be willing to participate in the scheme (R. 751-752, 754, 758; 482-484). Petitioner arranged for Roy Hazael, a naturalized American citizen living in a Canadian suburb of Detroit, to meet with Scharf in New York, and he paid Hazael's air fare from Detroit to New York (R. 482-485). A few days later Scharf and Hazael met again, this time with petitioner in Detroit (R. 491-492, 757-758). It was agreed that Hazael would sign the necessary documents for Scharf in return for a "salary" of $150 per week (R. 489, 494).

Pursuant to this arrangement, Scharf (through his corporation, Management House, Inc.) began pur-

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[6] Scharf disappeared following the filing of the indictment and has not been found or brought to trial.

[7] "R." refers to the appendix below.

[8] The false certificates of ownership were attached to the purchased foreign stock certificates when resold.

chasing securities in Hazael's name in August 1964 (R. 292). At least $28,500,000 worth of securities were so acquired between September 2, 1964 (the date of enactment of the Act) and up to and including April 1965 (R. 292; Govt. Ex. 67, R. 232; Govt. Exs. 113, 114, R. 253; Govt. Exs. 119, 121, R. 291).[9] Hazael signed all necessary ownership documents in connection with these purchases and he also signed interest equalization tax returns for the quarterly periods ending September 30, 1964, and December 31, 1964, which had been prepared by Scharf's accountants (R. 243, 247, 252, 257, 554-558). Although the returns revealed substantial tax liabilities, no payments accompanied the returns (R. 262-263, 266-268).

In January 1965, a local Canadian newspaper published a story about Hazael's reported, unpaid tax liability, which by that time approximated three million dollars; Hazael was employed as a shipping clerk and had net financial assets of about three hundred dollars (R. 559-560; 479-480, 561). He hurriedly called Scharf for advice and was told to "sit tight" (R. 561, 564-565). Thereafter Hazael, whom Scharf had previously paid by check, received his weekly $150 in cash from petitioner (R. 563, 566).

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[9] After enactment of the Act the arbitrage profit, as such, became unimportant; the scheme became wholly a device to shift the incidence of the interest equalization tax from Scharf, the real purchaser, to Hazael, who was in essence being paid for the risks involved in his assumption of liability.

Scharf sent to Hazael for his signature an affidavit containing several false statements (including an assertion that his family owned a local cannery) which exonerated Scharf from any tax liability in connection with the purchase and resale of the securities purchased in Hazael's name (R. 570-575; Govt. Ex. 137, R. 567). After considering the matter, Hazael decided not to return the affidavit but instead to discuss the matter with Internal Revenue Service agents (R. 571-572).

When petitioner testified before the grand jury he denied any involvment in Scharf's scheme (R. 754-759, 765), but he admitted obtaining and paying a lawyer for Hazael because the latter had no money (R. 761). However, petitioner also testified that his weekly cash payments to Hazael represented installment repayments of a $3000 loan which Hazael had been able to make because "his mother owned a cannery * * * and he had some money" (R. 759-766). Hazael denied ever having loaned money to petitioner (R. 621).

ARGUMENT

1. Petitioner's contention (Pet. 19-20) that the proof was not sufficient to support his conviction was fully answered by the court of appeals (Pet. App. A8-A9):

> There is adequate proof of Binder's complicity. He found Hazael and introduced him to the other defendants. He paid Hazael's airfare to New York. Shortly thereafter he met with Scharf and

Hazael in Detroit, and the jury could have found that in Binder's presence Scharf explained to Hazael what the latter was expected to do and that Hazael was there guaranteed a job for five years. From this evidence Binder must have known that Hazael, an American citizen living abroad, was to be used as a dummy for the large purchases and sales of foreign-owned foreign securities. Moreover, after Hazael learned in January 1965 of the tremendous tax liability he had unknowingly incurred, Binder began to make the payments of the $150 weekly owing to Hazael in cash. Binder's explanation to the grand jury that he had borrowed $3,000 from Hazael and was repaying it at $150 a week was such that the jury which convicted him might have concluded that his entire story was false.

2. Petitioner contends (Pet. 14-19) that his conviction violates the *ex post facto* clause of the Constitution. This contention apparently relates solely to the conspiracy count [10] and seems to be based upon the facts that evidence as to transactions undertaken prior to the enactment of the Interest Equalization Tax Act was admitted at trial and that the trial judge denied petitioner's request to charge the jury not to consider such transactions in determining the existence of a conspiracy. See Pet. 15. However, the evidence of pre-enactment transactions was properly admitted, because, as the trial judge noted, such transactions

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[10] Petitioner apparently concedes that the substantive counts charge crimes that were complete only after enactment of the Interest Equalization Tax Act. (Pet. 19).

were relevant to the determination of the purpose, intent and knowledge with which acts were committed thereafter (R. 1071, 1076-1077). Thus the admission of the evidence did not offend the *ex post facto* clause of the Constitution. *United States* v. *Russo*, 442 F. 2d 498, 501 (C.A. 2); *Christianson* v. *United States*, 226 F. 2d 646, 652 (C.A. 8), certiorari denied, 350 U.S. 994. Petitioner's requested charge to disregard all such evidence was therefore, as the court of appeals noted "correctly denied * * * for the pre-September 2, 1964 acts were evidence both of the beginnings of the enterprise and the intent of the defendants" (Pet. App. A7, n.4).[11]

The indictment charged the commission of overt acts after the date of the enactment of the Interest Equalization Tax Act, and there was ample proof that petitioner had reaffirmed his participation in the conspiracy after that date. That the jury accepted this proof of petitioner's post-enactment involvement is indicated by its verdict on the substantive counts charging petitioner with attempted evasion of tax liabilities for periods subsequent to the enactment of the Act. Thus the court of appeals correctly concluded that the conspiracy conviction was "based on post-September 2, 1964 acts" (Pet. App. A7).

Moreover, although the issue is not raised by the

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[11] The request presumably would have been granted had the charge been clearly framed as an instruction limiting use of such evidence to purpose, intent and knowledge (R. 1077-1078). The trial judge's charge to the jury did in fact refer several times to the date of enactment (R. 1190, 1191, 1203, 1211).

facts here, a conviction of conspiracy to evade taxes and defraud the United States based on transactions undertaken prior to passage of the taxing act would not violate the *ex post facto* clause, as long as the statutory offense of conspiracy was in effect at the time of the transactions: the fact that the tax which conspirators seek to evade has not yet been imposed or enacted does not alter the criminal nature of the conspiratorial undertaking. Cf. *United States* v. *Klein*, 247 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 924 (upholding a conspiracy conviction when the tax sought to be evaded never in fact accrued).

3. Petitioner's final contention (Pet. 20)[12] is that the count charging attempted evasion of the interest equalization tax for the quarterly period ending March 31, 1965, does not allege the filing of a false return. However, the count did allege preparation of a false return and also other affirmative acts (R. 18a-20a), and the jury was correctly charged that these acts were sufficient to establish an affirmative attempt to evade the tax liability (R. 1196-1198). See *Spies* v. *United States*, 317 U.S. 492, 499-500; *Sansone* v. *United States*, 380 U.S. 343.

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[12] Petitioner's co-defendants (Samuels, No. 71-1307; Blauner, No. 71-6519) also assert that the post-indictment delay violated their Sixth Amendment right to a speedy trial. Since petitioner does not raise this contention it need not be considered here.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
CHARLES J. ALEXANDER,
Attorneys.

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